Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Connect America Fund	WC Docket No. 10-90
A National Broadband Plan for our Future	GN Docket No. 09-51
Establishing Just and Reasonable Rates for Local Exchange Carriers	WC Docket No. 07-135
High-Cost Universal Service Support	WC Docket No. 05-337
Developing a Unified Intercarrier Compensation Regime	CC Docket No. 01-92
Intercarrier Compensation for ISP-Bound Traffic	CC Docket No. 99-68
Federal-State Joint Board on Universal Service	CC Docket No. 96-45
Lifeline and Link-Up	WC Docket No. 03-109

COMMENTS OF THE
NEW YORK PUBLIC SERVICE COMMISSION

INTRODUCTION

The New York State Public Service Commission (NYPSC) submits these comments in response to the Federal Communication Commission (FCC) Public Notice of Further Inquiry into Certain Issues in the Universal Service-Intercarrier Compensation Transformation Proceeding, issued August 3, 2011 (Public Notice). Universal service funds and intercarrier compensation (ICC) provide subsidies for the actual cost of telecommunications network operations to ensure lower retail rates. The FCC's objectives in this Proceeding include implementation of reforms to modernize the Universal Service Fund (USF) and rationalize ICC rules as telecommunications networks transition to general broadband deployment and to responsibly allocate universal service support to maximize the existing level of funds available. The Public Notice seeks comment on issues raised in proposals submitted by several interest groups for accomplishing these objectives. The proposals include a (1) consensus plan developed by a consortium of large and mid size price cap carriers and associations representing rate-of-return (ROR) carriers (America's Broadband Connectivity (ABC) Plan) and (2) proposals submitted by the State Members of the Federal State Joint Board on Universal Service (State Members Plan).

In summary, the NYPSC recognizes the urgent need for reform of federal universal service funding and ICC rules and supports the overall concept of using the proposed Connect America Fund (CAF) for support of voice and broadband deployment, the multi-year transition to a reduction in per-minute intrastate terminating rates and transitional recovery of lost intrastate revenue through authorized (not required) increases in federal Subscriber Line Charges (SLC) charges and CAF funding (Access Replacement Mechanism (ARM)). In working toward these objectives, however, the FCC must work with states and respect their legitimate jurisdiction and interest in managing the transition to achieve reform in a competitive environment.

DISCUSSION

Universal Service Reforms

The NYPSC consistently supports the increased deployment of broadband, provided that it is achieved in a thoughtful and efficient way. Given the fact that excessive subsidies may hinder economic activity and impose a burden on consumers making contributions to the fund, it is important that the FCC structure any USF reform in an efficient and effective manner, with attention to rigorously controlling costs and implementing decisions to target the amount of support where needed. New York's concern with the cost of universal service primarily arises because the State is a substantial net contributor to the FCC's USF program. We, therefore, support all reasonable proposals to contain the costs of the proposed CAF and to efficiently allocate funds to maximize benefits.

Policy Arguments against Preemption of State COLR Obligations for Price Cap ILECs

In the ABC Plan's transition toward CAF broadband support and away from legacy support programs, it proposes - for price cap carriers - FCC preemption of any state carrier of last resort (COLR) obligations as inconsistent with federal broadband policy,[1] unless the state fully funds the obligations with explicit support and an incumbent local exchange carrier (ILEC) agrees to accept the obligation in exchange for funding. Rate-

[1] The National Broadband Plan defines COLR as: "The carrier that commits (or is required by law) to provide service to any customer in a service area that requests it, even if serving that customer would not be economically viable at prevailing rates (Federal Communications Commission, Connecting America: The National Broadband Plan (March 16, 2010), p. 351).

of-return carriers would remain subject to rate of return regulation and continue to carry out their COLR obligations.

COLR obligations include a duty to serve all customers in a geographic region, interconnection with networks of telephone corporations and extension of service lines, and authority, including imposition of conditions, for exiting a market. In a broader sense, COLR obligations may include service quality and public safety, including Emergency 911 requirements. The NYPSC determined that:

> Basic services should be available to all residents who wish to use them. Residential services should include, at a minimum, the basic service elements listed above and, consistent with existing rules, these services must be available to all residential customers in the provider's service territory.[2]

To implement this policy, the NYPSC decided that, because virtually no areas exist in New York State where telephone service is not available, all carriers are subject to common carriage obligations. Carriers seeking to withdraw basic voice service offerings in any service territory are required to comply with exit procedures under Migration Guidelines to ensure continuation of basic voice service.[3]

State authority relating to COLR voice obligations, including exit requirements and migration procedures, is necessary to assure preservation of universal service for voice service customers. In the remote possibility and most extreme

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[2] Case 94-C-0095, Regulatory Framework for the Transition to Competition in the Local Exchange Market, Opinion 96-13 (issued May 22, 1996).

[3] Case 00-C-0188, Migration of Customers Between Local Carriers, Order Adopting Phase II Guidelines (issued June 14, 2002).

circumstances where complete loss of voice service on a temporary or permanent basis is threatened, a state needs regulatory tools, including COLR obligations, to ensure that voice service is continued for these customers. States are uniquely suited to resolve, oversee and enforce requirements relating to local COLR voice service issues; and, states are directly on the front line of responding when customers and public officials express serious concerns about suspension of voice service due to a company's exit from the market. It is probable that the transition to broadband and discontinuance of legacy funding of voice service, as occurs with most transformative projects, will give rise to many as yet unknown issues and challenges impossible to predict. The move to provision of broadband service and phase-out of legacy funding does not mean that COLR voice obligations are no longer needed, because this transition is not a guarantee that universal access to voice services will continue. The states must be permitted to maintain COLR obligations to manage this transition because COLR policies provide necessary tools for state regulators to maintain one carrier to provide essential voice service in every area of the state and, indeed, to maintain interconnection of telecommunications carriers.

Rate-of-Return Carriers - Interstate Rate of Return

The Public Notice requests comment on changes in the calculations of universal service support provided to smaller, rate-of-return companies, including re-examination of the current 11.25 percent interstate rate of return. The ROR carriers propose use of a ten percent rate of return; and, the

State Members Plan recommends setting the rate of return at 8.5 percent.

The FCC prescribed the current rate of 11.25 percent in a period of much higher interest rates. An analysis comparing equity and debt rates at the time the FCC rates were put in place with the rates in today's environment indicates that capital costs have fallen substantially.

	30 Year Treasury	BBB Rated Debt	Equity Cost Rates[4]
1990	8.26%	9.94%	13.0%
2011	4.27%	5.38%	8.9%
Decline	48.3%	45.9%	31.5%

These measures of capital cost rates all indicate a 30% decline or greater. The NYPSC recommends that the FCC examine these cost rates and apply the methodology it employed in 1990 with a reasonable proxy group. Applying a 30% reduction to an interstate rate of 11.25% gives an implied interstate rate of return today of 7.88%.

State - Federal Partnership

The NYPSC supports a role for states, in partnership with the FCC, in overseeing the transition of the telecommunications network as it evolves from a public switched telephone network (PSTN) to an Internet Protocol (IP) network.

[4] The FCC's midpoint of return on equity (ROE) used to develop the interstate rate of return in 1990 is the basis for 1990 cost rate. Merrill Lynch's Quantitative Profiles July 2011 ROE Analysis is the basis for the 2011 cost rate.

That partnership will provide a viable, robust and reliable telecommunications network which can provide for the safety and welfare of the citizenry and advance universal service to include access to broadband services.

The FCC proposed a number of responsibilities that states could undertake in relation to monitoring and oversight of recipients receiving federal USF support, as funded services are expanded to include broadband, including determinations relating to: (1) which census blocks are served by unsubsidized competitors and, therefore, are not eligible for CAF support; (2) whether a provider made a substantial broadband investment and is, therefore, eligible for an offer of support; and (3) whether charges for extending service to un-served areas (build-outs) are reasonable, based upon local conditions. Each of these functions builds on the local expertise of state commissions and would allow their knowledge to inform the process and increase the overall efficiency of the program.

We recommend that carriers should file copies of information relating to public interest obligations only with the FCC and make the information available to states, as not all states will make use of the information. Lastly, we understand the FCC's interest in collecting customer complaint information related to unmet commitments by recipients of universal service subsidies. However, states are able to carry out these kinds of responsibilities successfully only if they are able to assert jurisdiction to resolve complaints. If the FCC effectively preempts states regarding interconnected IP-based services, the states would incur the cost for collecting such information without the concomitant ability to resolve their residents' concerns. This would not further state interests nor be an efficient role for states to assume in the process.

Intercarrier Compensation Reforms

Reforming access charges is long overdue; and, the NYPSC instituted a proceeding to address intrastate access charge reform.[5] The NYPSC supports the general concepts of the proposed reforms, including a multi-year transition for a reduction in per-minute intrastate terminating rates for all traffic routed to or from the PSTN, regardless of provider or technology and recovery of lost intrastate revenue through authorized (not required) increases in federal SLC charges and CAF funding for carriers to enable them to recoup most revenue losses during a transition period.

Legal Authority: Preemption of State Role Relating to Intrastate Access Charges, Interconnected VoIP and COLR Obligations

With respect to intercarrier compensation for intrastate access rates, the ABC Plan seeks to establish a statutory framework to adopt a uniform default rate for all traffic (including intrastate access) routed over the PSTN under the Telecommunications Act of 1996 (Act) (47 U.S.C. §§201, 251 and 332). The ABC Plan also provides that the FCC can establish a uniform default rate for all traffic (including interconnected VoIP) pursuant to its "inseverability" or impossibility doctrine based upon dramatic marketplace and technological changes

[5] Case 09-M-0527, Universal Service Fund, Notice Establishing Universal Service Proceeding (issued August 3, 2009); and, Order Adopting Terms of Phase I Joint Proposal (issued July 16, 2010), p. 28. After submission of the ABC Plan to the FCC, the parties suspended negotiations in this proceeding.

allegedly blurring the traditional distinctions between interstate and intrastate traffic, and claims that any attempt to regulate the intrastate component of such traffic by the states would inevitably interfere with the accomplishment of the FCC's longstanding goals of eliminating inefficient arbitrage opportunities and promoting broadband deployment. The ABC Plan would preempt any state COLR obligations that thwart these FCC goals. As discussed below, however, any undue preemption of state jurisdiction over interconnected VoIP and COLR obligations based on the "inseverability" or impossibility doctrine would be unlawful. While the NYPSC has concerns about the FCC extending federal jurisdiction to intrastate access charges, we recognize that the FCC is uniquely positioned to balance competing policy trade-offs and effectively implement ICC reform. If ICC reform is done in a manner that does not penalize New York's interests, we would need to weigh our jurisdictional concerns relating to the establishment by the FCC of ICC reform against New York's strong state interest in achieving badly needed reforms.[6]

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[6] The ABC Plan attempts to rely upon Core Communications, Inc. v. Federal Communications Commission, 592 F.3d 139 (D.C. Cir. 2010) in claiming that §251(b)(5) reaches all traffic, including intrastate toll. That case, however, involved dial-up internet traffic which is special because it involved interstate communications delivered through local calls; it, thus, simultaneously implicates the regimes of both §201 and §§251-252. The D.C. Circuit noted that Petitioners in that case did not dispute the fact that an end-to-end analysis showed the dial-up calls to be interstate. It also observed the parties agreed that access service is not governed by the reciprocal compensation regime of §251(b)(5). As previously stated in the NYPSC's April 18, 2011 comments in this proceeding, this interpretation would result in the FCC exceeding its statutory authority. Accordingly, the NYPSC

Section 2(b) (47 U.S.C. §152(2)(b)) precludes the FCC from preempting lawful state regulation governing intrastate communications. Thus, communications occurring between points within the same state may be regulated only by that state.[7] Section 2(b) does not distinguish between telecommunications and information services.[8] The FCC's ancillary jurisdiction under Title I of the Act, by which the FCC regulates information services, does not override that section.[9] Consequently, intrastate aspects of telecommunications or information services remain subject to state regulation. And because call endpoints of fixed IP/PSTN services can be identified, intrastate communications, as well as other intrastate aspects of those services, can be identified, and may, therefore, be regulated by the states.[10]

Congress established a dual state-federal regulatory scheme for communications services, assigning federal

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incorporates by reference its previously filed April 18, 2011 comments herein.

[7] National Association of Regulatory Utility Commissioners v. FCC, 746 F.2d 1492, 1498 (D.C. Cir. 1984).

[8] People of the State of California v. FCC, 905 F.2d 1217, 1239-40 (9th Cir. 1990).

[9] AT&T v. Iowa Utilities Board, 525 U.S. 366, 381, n. 8 (1999).

[10] See Minnesota Pub. Utilities Commission v. FCC, 483 F.3d 570, 581-83 (recognizing the difference between fixed and nomadic VoIP services); see also Universal Service Contribution Methodology, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, 7546 ¶56 (recognizing that VoIP providers capable of identifying intrastate and interstate calls would be subject to state regulation).

jurisdiction to interstate communications and preserving state jurisdiction over intrastate communications. Section 2(a) of the Act grants the FCC exclusive jurisdiction over "all interstate and foreign communication" (47 U.S.C. §152(a)). The Act generally precludes the FCC from exercising jurisdiction over intrastate communications, with various exceptions not relevant here. Section 2(b) of the Act provides that "nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . ." (47 U.S.C. §152(b) (emphasis added). In general, telephonic communication occurring between points within the same state may be regulated only by that state.[11] It is indisputable that fixed VoIP, including, but, not limited to, cable VoIP, carries intrastate calls. Any preclusion of state authority apparently arises merely by virtue of the utilization of those facilities for VoIP telephony rather than circuit-switching technology.

In support of its preemption of state regulation, the ABC Plan improperly invokes the "inseverability" or

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[11] The FCC also relied upon the "dormant Commerce Clause," stating that state regulation would "likely" violate the Commerce Clause. The Dormant Commerce Clause doctrine is inapplicable here, because it only applies where Congress has not regulated (See Northeast Bancorp, Inc. v. Board of Governors of Federal Reserve System, 472 U.S. 159, 174 (1985). Commerce power is not dormant where Congress has acted. Here, Congress specifically exercised its power under the Commerce Clause to permit state regulation of intrastate service (47 U.S.C. §152(b)).

impossibility exception to the prohibition, under 47 U.S.C. §152(b), against federal regulation of intrastate communications. The FCC may preempt state regulation of intrastate telecommunications matters only when (1) it is impossible to separate the interstate and intrastate components of FCC regulation; and (2) state regulation would negate the FCC's lawful authority over interstate communication.[12] The ABC Plan does not satisfy either prong of this test, to the extent it seeks to entirely preempt any valid state regulation over fixed VoIP or COLR obligations.

First, the impossibility exception presumes, as a threshold matter, that regulation of the service at issue cannot be separated into interstate and intrastate components. Because intrastate calls over fixed VoIP services can be identified, they can be regulated by the states separately from federal regulation. Therefore, the first criteria of the inseverability, or impossibility, exception cannot apply. Further, to the extent the ABC Plan invokes the "mixed-use rule" to preempt state regulation of fixed VoIP, that application is also inappropriate to fixed VoIP. The mixed-use rule, a rule of administrative convenience, assigns jurisdiction to the FCC where interstate and intrastate communications occurring over a service cannot be separated, and the interstate component is more than de minimis. The circumstance permitting application of this rule, that is, alleged inseverability of interstate and intrastate communications, is not present in fixed VoIP

[12] Iowa Utilities Board v. Federal Communications Commission, 120 F.3d 753, 796 (8th Cir. 1997), rev'd sub nom. on other grounds (AT&T v. Iowa Utilities Board, 525 U.S. 366 (1999)).

telephony. It is possible to identify the location of any caller using fixed VoIP telephony and the location of any called party on either a fixed VoIP system or on a wireline system. Therefore, the mixed-use rule is clearly inapplicable here.[13]

Second, the ABC Plan fails to satisfy the burden of justifying a wholesale preemption of state jurisdiction of interconnected VoIP or COLR obligations by failing to demonstrate "with some specificity" that it is narrowly tailored to preempt only such state regulations as would necessarily negate FCC policies. To be valid, preemption must be limited to state regulation that would negate the FCC's exercise of its own lawful authority over interstate communications. Importantly, the ABC Plan fails to explain why wholesale preemption of state regulation is required in order to advance legitimate federal regulation.

The ABC Plan conclusively states that any attempt by the states to regulate the intrastate component of VoIP traffic would inevitably interfere with the FCC's policy objective of establishing a default uniform rate for all access traffic. Such interference with federal policies is not enough to support a finding of impossibility (Louisiana Public Service Commission

[13] Minnesota Public Utilities Commission v. FCC, 483 F.3d 570, 578, upheld the FCC decision "to consider the economic burden of identifying the geographic end points of VoIP communications in determining whether it was impractical or impossible to separate the service into its interstate and intrastate components." The economic and practical burden of separating nomadic VoIP into interstate and intrastate calls for entry and billing purposes is infinitely greater than the burden of identifying interstate and intrastate calls for fixed VoIP. Those calls can be separated, for instance, based on numbers associated with such calls.

v. Federal Communications Commission, 476 U.S. 355, 375). The ABC Plan fails to provide any explanation as to why such a finding of interference can be made regarding non-access regulation of fixed VoIP services and COLR obligations. The failure to provide such an explanation as to why federal access pricing regulation is negated if states regulate intrastate fixed VoIP means the ABC Plan has not met the burden of showing that preemption is narrowly tailored to avoid conflict with certain federal regulatory goals. Mere assertion of federal jurisdiction does not create preemption of state law in a dual state-federal regulatory scheme (Louisiana Public Service Commission v. Federal Communications Commission, 476 U.S. 355, 372).

The ABC Plan does not explain why all state regulation would necessarily negate FCC policy. For instance, states can continue to regulate intrastate fixed VoIP telephony and consider COLR obligations as needed in the public interest, without interfering with certain federal objectives. That is, states could set standards for reliability and service quality over the provision of intrastate calls without interfering with federal pricing standards. Moreover, the states could establish COLR requirements without interfering with a uniform federal rate for intercarrier compensation. The ABC's Plan to take action to effectuate a uniform federal rate as a policy matter does not override the §2(b) statutory bar against FCC regulation of intrastate communication.[14]

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[14] Louisiana Public Service Commission v. Federal Communications Commission, 476 U.S. 355, 374 (1986).

Terminating Access Charges

NYPSC supports the reduction of access charge rates and, in addition, all call termination charges to a level that approximates the actual cost of providing that service. Reform of intercarrier compensation is an important and essential public policy objective and the recommended steps toward, first, reaching parity with interstate access rates and, then, establishing a final uniform rate for all call termination are reasonable.

Originating Access Charges

The NYPSC recommends inclusion of originating access rates in the reform plan for intercarrier compensation. The reform effort undertaken by the FCC in this proceeding may provide a unique opportunity to achieve comprehensive reform of the intercarrier compensation regime. It is suggested that the FCC could accomplish originating access reform by modifying requirements relating to equal access to long distance service provided by interexchange carriers (IXCs). This regulatory constraint is outdated, in light of the significant technological and market changes that have occurred over the past decade. It is possible that this action will cause the industry to self-remedy the originating access issue by migrating to exclusively bundled local/toll service for its subscribers, similar to the packages offered by wireless and cable telephony providers. Bundled service is already an option for customers of the large incumbents with IXC affiliates. It is likely that rural local exchange carriers and competitive local exchange carriers operating with contracts for long distance transport would offer this option to their customers.

If modification of the equal access requirement were to occur, originating access charges could be subsumed in the minute-of-use charges in contracts between local exchange and toll providers. Under this arrangement, carriers would recover any shortfall resulting from relinquishing originating access charges through business-to-business contracts. This paradigm shift would reform the inequities resulting from imposition of originating access charges, remove an asymmetrical competitive wireline impediment which is not a requirement for wireless and cable carriers, and allow carriers to negotiate on a business-to-business basis for provision of long distance service, thereby eliminating the need for separate payment of charges for originating access. Once the industry reaches the point where all traffic is exchanged between only two carriers (originating and terminating), it may be possible for the entire intercarrier compensation regime to move to a more cost effective model, that is, bill and keep arrangements.

<u>Rate Benchmark</u>

The FCC requests comment on the use of a rate benchmark to encourage a rebalancing of rates and ensure that the CAF does not subsidize the artificially low rates of some carriers. The NYPSC concurs that it is important to minimize eligibility for recovery of losses from the federal CAF in states that have not raised intrastate end user rates. Some companies have kept local service rates far below cost and competitive levels. While this is their prerogative, it is unfair for residents of other states to make up the difference.

The proposal for two separate rate benchmarks for price cap and ROR carriers under the ABC Plan, $30 and $25 respectively, raises concerns, as it will continue the unfair subsidy of artificially low rates for rate-of-return carriers. These proposed rate benchmarks include not only charges for basic service but also rates associated with mandatory Extended Area Service (EAS), any state universal service charge, as well as the SLC. In 2006, the NYPSC determined a basic service rate cap of $23 was affordable and would support universal service goals, without any inordinate effect on consumers.[15] If SLCs and other charges are added to the $23 charge, the result is establishment of a rate that is near or at the $30 benchmark level proposed for price cap carriers. To establish a different benchmark for ROR carriers creates an unnecessary distinction and violates principles of equity, as it would allow these companies to qualify for subsidies at a lower rate when the cost to provide service is typically higher. This would result in continuing support of artificially low rates that are not related to costs and not necessary to maintain universal service. The artificial distinction between price cap and ROR carrier benchmarks should not be adopted.

Impact on Consumers

The ABC Plan expects cost reductions from lower ICC rates to flow through to consumers and result in price reductions and additional investment and innovation, solely due to the competition among wireless carriers and between wireline telephone providers and all intermodal telephony providers. The ABC Plan concludes that, given the amount of competition in

[15] Case 05-C-0616, Transition to Intermodal Competition, Statement of Policy on Further Steps Toward Competition in the Intermodal Telecommunications Market and Order Allowing Rate Filings (issued April 11, 2006), p. 61 et seq.

wireless markets and among wireline telephone and cable companies, a regulatory policy requiring carriers to flow through ICC reductions is unnecessary and potentially harmful.[16] The FCC requests comments on whether it should leave realization of consumer pass-through benefits due to ICC reform to the markets, as the ABC Plan suggests, or take steps to assure benefits are realized by consumers. The NYPSC recommends that the FCC quantify consumer benefits derived from ICC reform and devise a methodology for assuring that these benefits flow through to consumers.

Voice over Internet Protocol (VoIP) ICC

Under the ABC Plan, the FCC would adopt a rule, effective January 1, 2012, to establish ICC rates applicable to VoIP traffic. The rate would apply to traffic to or from customers of interconnected VoIP (for example, cable digital phone service) and to customers of nomadic VoIP (provided by carriers, such as Vonage). Under the ABC Plan, a local VoIP call is subject to reciprocal compensation and a toll VoIP call is subject to the prevailing interstate access charge rate; call detail is used to identify each type of call; and, intrastate rates do not apply to any VoIP calls. The FCC proposes to use call record information or, in the alternative, a safe harbor percentage, for example, assumption that 50% to 60% of all traffic is VoIP. The NYPSC supports these reforms because they will eliminate controversy and disputes over application of ICC rules to VoIP, may produce additional revenue for local exchange carriers to offset decreases in ICC revenues, and, would

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[16] ABC Plan, Attachment 4, Professor Hausman Consumer Benefits Paper, p. 9.

eliminate existing arbitrage opportunities, including phantom traffic and traffic pumping.

CONCLUSION

The NYPSC strongly supports reform of the federal universal service programs and ICC systems. To charge different rates for similar services is no longer sustainable; and, subsidies embedded in access charges are outmoded and impediments to efficiency and innovation. In achieving its reforms, however, the FCC should recognize the states' legitimate jurisdiction and interest in managing the intrastate portion of the transition to reform and refrain from undue preemption of state authority.

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